

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

) MDL No. 1917

) Case No. C-07-5944-SC

This Order Relates To:

ALL DIRECT ACTION PLAINTIFF
ACTIONS

) ORDER DENYING DIRECT ACTION
) PLAINTIFFS' RENEWED MOTION
) TO COMPEL PRODUCTION OF THE
) EUROPEAN COMMISSION
) DECISION

I. INTRODUCTION

Now before the Court is Direct Action Plaintiffs' ("DAPs") renewed motion to compel Defendants to produce a confidential decision (the "Decision") by the European Commission ("EC") reflecting its investigation into allegations of a global conspiracy to fix the prices for cathode ray tubes ("CRTs") and color picture tubes ("CPTs"). The motion is fully briefed¹ and appropriate for resolution without oral argument under Civil Local Rule 7-1(b). For the reasons set forth below, the motion is

¹ ECF Nos. 2843 ("Mot."); 2873 ("Opp'n"); 2896 ("Reply"); 2919 ("Notice").

1 DENIED. DAPs also request, in the alternative, that the Court
2 request the Decision directly from the EC. This request is DENIED
3 without prejudice.

4
5 **II. BACKGROUND**

6 In this motion, DAPs renew their earlier request for an order
7 compelling Defendants to produce the EC's Decision. The EC has not
8 yet published a public or redacted version of the Decision, but
9 various public documents confirm its broad contours. The Decision
10 found the existence of two highly organized cartels comprised of,
11 generally speaking, the same defendants here, which were aware of
12 the illegality of their activities and ultimately successful in
13 imposing price increases on consumers in the CRT and CPT
14 industries. See ECF No. 2446 at Exs. 2-3. Based on these
15 findings, the EC imposed a collective fine of more than € 1.47
16 billion. Id. at Ex. 2. When the EC issued the Decision, it said
17 it was working with the companies involved to prepare a public,
18 redacted version of the Decision "with a view to a quick
19 publication," although such a version has not been published to
20 date. Id. at Ex. 4.

21 The Decision has been the target of discovery in this
22 litigation since 2010, but Defendants have refused to produce the
23 Decision citing their belief that European Union ("EU") law and EC
24 policy prohibit the disclosure of such decisions. DAPs disagree,
25 and in March 2014 moved to compel production of the Decision before
26 the Special Master. Id. at 1. The Court withdrew the reference
27 and denied the motion without prejudice, finding that the interests
28 of international comity outweighed the interest of disclosure. ECF

1 No. 2463 ("Prior Order") at 8. In doing so, the Court noted
2 "Defendants seem optimistic about the EC's publication of a public
3 version of the Decision before the close of discovery in this case.
4 They are advised to assist in that task." Id.

5 Now that discovery has closed and the Decision has still not
6 been published publicly, DAPs renew their motion. In support of
7 the motion, DAPs argue that because discovery has now closed and
8 the trial date is rapidly approaching, the balance between comity
9 and the importance of the Decision to this litigation has so
10 shifted as to now justify production. Furthermore, DAPs point out
11 that in another proceeding, Vichi v. Koninklijke Philips
12 Electronics, N.V., 85 A.3d 725 (Del. Ch. 2014), the EC made a
13 partially redacted version of the Decision available in response to
14 a request for assistance from the Delaware Chancery Court. Id. at
15 751 & n.180. As a result, DAPs submit that the balance of the
16 relevant factors has changed such that the Court should order
17 Defendants to produce a copy of the decision or, in the
18 alternative, formally request the assistance of the EC in obtaining
19 the Decision. Mot. at 2-3. Defendants oppose both requests.

20 Shortly after this motion was fully briefed, the Court
21 received a notice from the California Attorney General's (the "AG")
22 office including official correspondence from the EC's Directorate
23 General for Competition ("DG Competition") regarding the AG's
24 efforts to obtain a redacted public version of the Decision.
25 Notice at 2; Ex. 2 ("DG Competition Ltr."). In that
26 correspondence, the EC explains its publication process and the
27 variables that may impact the publication schedule. While the EC
28 states that due to these variables "no precise publication date can

1 be given," "the case team gives its best effort in completing a
2 public version of the decision still during this autumn or at least
3 publishing a provisional version before the European Commission
4 Christmas holidays break." DG Competition Ltr. at ¶ 15.

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6 **III. LEGAL STANDARD**

7 As it did with DAPs' earlier motion to compel, the Court
8 applies the factors identified by the Supreme Court in Société
9 Nationale Industrielle Aérospatiale v. United States District Court
10 for the Southern District of Iowa, 482 U.S. 522 (1987). In
11 Aérospatiale, the Supreme Court held that courts assessing whether
12 foreign law excuses noncompliance with a United States court's
13 discovery orders should consider:

14 (1) the importance to the . . . litigation of the
15 documents or other information requested; (2) the degree
16 of specificity of the request; (3) whether the
17 information originated in the United States; (4) the
18 availability of alternative means of securing the
19 information; and (5) the extent to which noncompliance
with the request would undermine important interests of
the United States, or compliance with the request would
undermine important interests of the state where the
information is located.

20 Id. at 544 n.28; see also Richmark Corp. v. Timber Falling
21 Consultants, 959 F.2d 1468, 1474-75 (9th Cir. 1992). This list is
22 not exhaustive. The Ninth Circuit has also considered other
23 factors, including "the extent and the nature of the hardship that
24 inconsistent enforcement would impose upon the person, . . . [and]
25 the extent to which enforcement by action of either state can
26 reasonably be expected to achieve compliance with the rule
27 prescribed by that state." United States v. Vetco, Inc., 691 F.2d
28 1281, 1287 (9th Cir. 1981); Richmark, 959 F.2d at 1475.

1
2 **IV. DISCUSSION**

3 As a preliminary matter, the weight of several of the
4 Aerospatiale factors is unchanged from the Court's ruling on DAPs'
5 earlier motion to compel. For example, the fact that the Decision
6 originated in the EU still weighs against production. Prior Order
7 at 5; see also In re Rubber Chems. Antitrust Litig., 486 F. Supp.
8 2d 1078, 1083 (N.D. Cal. 2007). Additionally, specificity once
9 again weighs in favor of production. Prior Order at 4.

10 Despite Defendants' arguments to the contrary, the Decision
11 also remains important to this litigation. While Defendants argue
12 that subtle differences in the cartel conduct at issue in the
13 Decision and the allegations here, as well as the extensive
14 discovery already completed, render the Decision only minimally
15 important, the Court's earlier findings on this factor need not be
16 disturbed: "the Decision is relevant, because DAPs' and other
17 plaintiffs' allegations in this case have always concerned the
18 international character of the alleged CRT conspiracy." Prior
19 Order at 5. In short, regardless of how the EC refers to the
20 conspiracies in the Decision, the underlying conduct -- price
21 fixing in the CRT and CPT markets -- indisputably overlaps with the
22 conduct at issue here. Furthermore, the EC's decision is over 350
23 pages long, DG Competition Ltr. at ¶ 12, and includes a
24 "comprehensive recitation of facts that are determined through
25 lengthy and thorough investigative and adjudicatory processes."
26 Mot. at 3. While extensive discovery has taken place to date, the
27 factual detail contained in the Decision is likely to be of
28 significant value in helping Plaintiffs organize their case and may

1 identify previously undiscovered competitor contacts or other
2 highly relevant conduct. Accordingly, this factor continues to
3 weigh in favor of disclosure.

4 Despite the Decision's importance to this litigation and the
5 rapidly approaching trial date, the Court remains convinced that
6 denying the motion to compel is the right course for three reasons.
7 First, EU law and EC policy remain unchanged: "disclosure of the
8 Decision would violate foreign law, frustrate the EC's
9 investigations of antitrust cases, and subject Defendants to harsh
10 sanctions at home and abroad." Prior Order at 7; see also id. at
11 7-8 (reviewing specific EU law and EC regulations and the
12 importance of the DG Competition to the EU's antitrust
13 enforcement). These concerns are not insignificant, as they
14 threaten to undermine the DG Competition, "the European Union's
15 primary antitrust law enforcer." Intel Corp. v. Advanced Micro
16 Devices, Inc., 542 U.S. 241, 250 (2004). Furthermore, as the Court
17 previously found, the importance of the EC's leniency program, and
18 cooperation between the EC and United States law enforcement
19 agencies including the Department of Justice, also militate against
20 disclosure. Prior Order at 7-8. Second, and relatedly, having
21 reviewed the DG Competition's letter, the Court sees no reason to
22 short-circuit the EC's publication process when the EC appears
23 confident that at least a provisional version of the Decision may
24 be published in approximately one month. Even if, as the DG
25 Competition speculates, the EC is only able to publish a
26 provisional version prior to the EC's Christmas holiday break, that
27 will still obviate any need to offend EU law and EC policy by
28 ordering production of the Decision.

1 The final reason for denying the motion, the availability of
2 the Decision outside this demand for production, merits separate
3 consideration. Since the Court's prior decision, DAPs point out
4 that the EC made a partially redacted version of the Decision
5 available in response to a request for assistance from the Delaware
6 Chancery Court. See Vichi, 85 A.3d at 751 & n.180. In the Court's
7 view this actually cuts against granting the motion to compel
8 because it suggests that, contrary to the Court's previous
9 conclusion, there actually is a means of accessing the Decision
10 "without contravening EU law and policy." Prior Order at 6.
11 Accordingly, the Court finds this factor now weighs against
12 granting the motion to compel.

13 Considering the factors identified in Aerospatiale, the Court
14 concludes that comity, the origin of the Decision, and the
15 availability of the Decision through other means outweigh the other
16 factors. Additionally, the Court does not envision that the weight
17 of these factors will change significantly enough to justify
18 compelling the disclosure of the Decision directly from Defendants
19 regardless of the status of this case. Accordingly, the motion to
20 compel is DENIED with prejudice.

21 Nonetheless, the Court must still address Plaintiffs'
22 alternative proposal that the Court request the Decision directly
23 from the EC as in the Vichi case. Defendants suggest the procedure
24 adopted in Vichi would be inappropriate here for two reasons: (1)
25 the EC already sent a letter to Defendants here opposing the
26 disclosure of the Decision, thus suggesting that it would oppose a
27 request from the Court, and (2) the Decision was more central to
28 the Vichi litigation. The Court disagrees with these arguments.

1 First, the letter Defendants refer to, ECF No. 2449-4 ("Van
2 Ginderachter Ltr."), sent by the DG Competition was intended "to
3 draw your attention to the fact that any such disclosure of [the
4 Decision on a motion to compel] would be made in contravention of
5 Commission rules and state policy on this issue." Id. at 1
6 (emphasis added). In other words, the letter was intended to
7 inform the parties and the Court that disclosure of the Decision by
8 the Defendants would contravene EC policy and EU law. Given the
9 contrary evidence in Vichi and the fact that this letter was
10 specifically targeted at disclosure of the Decision by the
11 Defendants, there is no reason to conclude the EC's response would
12 be the same if the Court were to request the EC provide the
13 Decision directly. Second, even though, unlike Vichi, this case
14 does not involve the question of whether the Decision has any
15 collateral estoppel effect, the Decision still is "directly
16 relevant to U.S. liability issues." Opp'n at 8. After all, the
17 Decision details conduct that Plaintiffs argue is actionable under
18 United States antitrust laws. Furthermore, there simply is no
19 basis on the face of the Vichi opinion for speculating as to why
20 the EC agreed to provide a version of the Decision. Without more,
21 the Court cannot conclude that the EC would refuse to provide the
22 Decision here.

23 Nevertheless, the Court believes issuing such a request at
24 this time would be inappropriate in light of the EC and DG
25 Competition's statements that they should be able to publish at
26 least a provisional version of the Decision by their Christmas
27 holiday. As a result, the Court DENIES Plaintiffs' request without
28 prejudice. If at least a provisional version of the Decision has

1 still not been published following the EC's Christmas holiday,
2 Plaintiffs may file a motion seeking the issuance of such a
3 request.

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5 **V. CONCLUSION**

6 For the reasons set forth above, the Court finds that the
7 factors identified in Aerospatiale weigh against granting
8 Plaintiffs' the motion to compel. Because the Court does not
9 envision that the weight of these factors will change significantly
10 enough to justify compelling the disclosure of the Decision
11 directly from Defendants, the motion to compel is DENIED with
12 prejudice.

13 Plaintiffs' alternative request that the Court seek the
14 Decision directly from the EC is DENIED without prejudice. If at
15 least a provisional version of the Decision has still not been
16 published following the EC's "Christmas holidays break," Plaintiffs
17 may file a motion seeking the issuance of such a request.

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19 IT IS SO ORDERED.

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21 Dated: November 20, 2014



22 UNITED STATES DISTRICT JUDGE
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